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No. 90-281

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ASSOCIATED GROCERS, INC.,
Petitioner,

v.

THE STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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REPLY BRIEF OF PETITIONER

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The Supreme Court of Washington, after holding that a state tax exemption "violates [petitioner's] rights under the Equal Protection Clause of the Fourteenth Amendment" (Pet. App. 6a), nevertheless ruled that "the proper remedy consists solely of [prospectively] striking the offending tax exemption." (Pet. App. 2a) We showed in our petition that the state court decision, rendered shortly before this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages*, No. 88-192, 110 S. Ct. 2238 (June 7, 1990), was flatly inconsistent with *McKesson* and the cases on which it was based.

The State's brief in opposition makes no serious response to our showing on the merits. Instead, the State attempts three diversionary tactics.

1. First, the State suggests that because petitioner did not use the words "due process" in its papers in the state courts, it failed to preserve the claim it makes here. (Br. in Opp. 6) That contention is unfounded. Petitioner's reconsideration motion to the Supreme Court of Washington [1] set forth the very claim petitioner now makes:

> Prospective severance alone is clearly an incomplete and therefore inappropriate remedy in this case . . . Prospective severance alone . . . serves to perpetuate the denial of equal protection suffered by Associated Grocers prior to the trial court's March 29, 1988 order, including the statutory refund period covered by RCW 82.32.060. (Resp. App. 5a-6a)

In support of this claim, petitioner cited and discussed at length the same decisions of this Court upon which the holding in *McKesson* was based,[2] including *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928); and *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931). No more is required.

2. Respondent then makes the extraordinary assertion that the Washington Supreme Court did not actually invalidate the exemption retrospectively at all, but that the effect of its holding was "to declare that the partial exemption . . . was constitutional and valid during all periods prior to April 1, 1990." (Br. in Opp. 8) But absolutely nothing in its opinion suggests that the state court thought the exemption had ever been constitutional. What the court said was:

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[1] See the appendix ("Resp. App.") to the brief in opposition ("Br. in Opp.") 1a-12a.

[2] See Resp. App. 10a-11a.

> The exemption, which applies only to distributors, violates Associated's rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution and the privileges and immunities clause of the state constitution (Const. art. 1, § 12). Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional.
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> * * * *
>
> [Petitioner's] contention, with which we agree, is that the partial exemption granted distributors under RCW 82.04.270(2) is unconstitutional. (Pet. App. 6a-9a)

After ruling the exemption unconstitutional, the state court turned to the question of remedy, ruling that the *remedy* should be prospective only, which is exactly what *McKesson* forbids. Respondent, citing *American Trucking Ass'n., Inc. v. Smith*, 110 S.Ct. 2323 (1990), tries to reverse engineer the erroneous ruling on remedy into a prospective-only holding on the underlying constitutional issue, but *ATA* itself forbids this: "[this] Court has never equated its retroactivity principles with remedial principles." *Id.* at 2336.

3. Finally, respondent restates portions of its cross-petition in No. 90-465. Petitioner has shown in its brief in opposition to that cross-petition that respondent's contentions are without merit.

CONCLUSION

The *McKesson* decision is controlling law which requires, under the Due Process Clause of the Fourteenth Amendment, that the Washington courts provide meaningful retrospective relief where unconstitutional state tax legislation results in an unlawful exaction under duress. The State of Washington has denied that due process safeguard to petitioner in this case. In the absence of action by this Court, petitioner and other Wash-

ington litigants will be denied the meaningful retrospective relief required under *McKesson*.

In *McKesson*, the Court noted that Florida could cure its discriminatory tax "through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period." 110 S. Ct. at 2258. The Court reversed and remanded for further proceedings.

In the present case, the Supreme Court of Washington did not have the guidance of this Court's opinion in *McKesson*, which was decided shortly after the state court denied reconsideration. Accordingly, the Court may wish to consider a summary remand of this case so that the state court may reconsider its denial of retrospective relief to Associated Grocers in light of *McKesson*.

Respectfully submitted,

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